

E. The principle that the law granted the renewal copyright to the widow to the exclusion of the children, has been long and firmly accepted by authors, music publishers, motion picture producers and others. Such has been the custom and usage in the purchase and sale of copyrights.

Thus, *Tobani v. Fischer*, 263 App. Div. 503, 33 N. Y. S. 2d 294 (1942), and its companion cases of the same title, 36 USPQ 97 (S. D. N. Y., 1937); 98 F. 2d 57 (CCA 2, 1938) cert. den. December 6, 1938, demonstrate that at least as far back as 1928 the practice in the music publishing business was based upon the principle that the renewal copyright in the event of the author's death went first to the widow, and to the children only if the widow pre-deceased them. The distinguished publishing house of Carl Fischer, Inc. sought to obtain during the last few years of the original term of copyright "complete protection" of its rights with respect to the renewal period. To acquire such "complete protection" it secured an assignment from the living author and his then living wife and made no effort to secure any grant with respect to the renewal period from the then living children.

The opinion of the Appellate Division states at pages 504, 505:

"... the right to renew accrues upon application during the last year of the original term, and is limited to those enumerated in the act, including the author, and in the event of his death, the widow, despite any attempted assignment by the author during the original term of copyright."

"The contract was prepared by the attorney for Fischer, the Tobanis having had no advice of counsel. The draftsman addressed himself to the task of protecting Fischer."

"He envisioned the possibility of the death of Theodore prior to that of Helene. He knew that if Helene survived Theodore, she would be entitled to apply for renewals which thereafter accrued as to compositions, the original terms of copyright of which belonged to Theodore, under the provisions of the Copyright Act. Helene's survival was not improbable as, at the time of the making of the contract, Theodore was seventy-three years old and Helene was fifty-four. In the succeeding paragraph, therefore, Helene assigned to Fischer all renewals of copyright to the compositions to which otherwise she might be entitled pursuant to the pertinent provisions of the Copyright Act. The assignment was prefaced by the following language:

"The parties hereto mindful of the possibility that Mr. Tobani may not be living when the original term of copyright affecting some of the compositions hereinbefore described expires, and desiring to provide for *the complete protection of Fischer in the event of such contingency* * * * Helene also agreed to execute any further instructions from time to time that might be necessary to accomplish the intended purposes. In the paragraph following, Fischer, 'In consideration of the foregoing,' agreed to pay Theodore twenty-five dollars a week for life and, upon his death and within thirty days thereafter, to pay to Mrs. Tobani the sum of Five Thousand Dollars (\$5,000) in cash." (Emphasis added).

We do not cite the three *Tobani* cases for the proposition that as a matter of law the surviving widow has exclusive priority with respect to the renewal copyright over the children, but we do submit that these cases indicate that, as a matter of practice, such was relied upon as the law.

Further evidence, that in practice such was regarded to be the law by those dealing with copyright, is the brief for petitioner of Arthur Garfield Hays and John Schulman, attorneys for the Authors League of America and the Songwriters Protective Association, in *Fisher v. Witmark*, *supra*, at page 25. Likewise the brief (at p. 15) of R. W. Perkins for respondent music publishing house of Witmark in the same case, the petitioner's brief (at p. 19) for the Fox Film Corporation in *Fox v. Knowles*, 261 U. S. 326 (1923), and the brief (at p. 44) of the cross-appellee in *Harris v. Coca Cola*, 73 F. 2d 370 (CCA 5, 1934).

II.

THE WORD "CHILDREN" IN THE COPYRIGHT STATUTE DOES NOT INCLUDE ILLEGITIMATES.

A. It is unquestioned common law doctrine that "... terms of kindred when used in a statute include only those who are legitimate, unless a different intention is clearly manifested," *McCool v. Smith*, 66 U. S. 459, 470 (1861). While this canon of statutory construction has its roots in the common law,³ it is still acknowledged and relied upon.

³When the court below attempts to restrict the doctrine of "filius nullius" to matters of real estate, it ignores the fact that the doctrine was received into all areas of the common law with but few exceptions. For example, an illegitimate did not have the right to the name or title of his father, *Pfeiffer v. Wright*, 41 F. 2d 464 (CCA 10, 1930); he did not take the domicile of either of his parents, *Bow v. Nottingham*, 1 N. H. 260 (1818); 1 Bl. Comm., 459 (Cooley 4th ed. 1899); nor did he have a right to support from either parent, *Hard's Case*, 2 Salk 427 (1696), 91 Engl. Rep. 371; *State v. Tieman*, 32 Wash. 294, 73 P. 375 (1903); *Moncrief v. Ely*, 19 Wend. (N. Y.) 403 (1838). The exceptions were instances where this settled rule of law succumbed to the pressure of overriding public policy such as religion (illegitimate, with respect to marriages barred by consanguinity, were blood relations of their parents), and public order (illegitimate were included in a statute prohibiting unauthorized marriages of infants). See 2 Kent, Comm., 214 (13 ed., 1884).

As late as 1953 the Court of Appeals for the Fifth Circuit in the opinion of *Ellis v. Hendersou*, 204 F. 2d 173, 174, stated: "The word 'child' employed in a document expected to have legal significance and especially in a statute to designate relationship with the 'father' would, without more, ordinarily, refer to legitimate offspring". (emphasis added).

The question thus presented for decision is whether or not in the renewal section, now before the Court, there exists such overwhelming evidence of an intention by Congress to include illegitimate in the phrase "children" as to justify the rejection of the usual, well understood and so relied upon interpretation.

The answer is self-evident.

There is nothing in the Act, nor in its legislative history, nor in business practice,⁴ since its enactment, which indicates, even remotely, a Congressional purpose to use the word "children" other than in its generally understood and interpreted meaning.

B. In the section of the Copyright Act presented to the Court for construction, the word "children" stands alone and unqualified by explanation.

Under the Act, adult self-supporting children take equally with dependents. Dependency upon the deceased author is not made a criterion for qualification. Moreover,

⁴An indication that it was believed that illegitimate did not take under the Copyright Act can be garnered from the following article: Samuel J. Elder, *Duration of Copyright*, 14 YALE LAW JOURNAL 417, 418 (1905):

"It is often very burdensome for an assignee to ascertain in the names of what persons renewals should be taken out. This frequently occurs in the case of writers of music who have entirely disappeared from sight before the lapse of twenty-eight years, leaving no trace behind. It has been said of one music publisher in Boston that he must constitute himself a court of divorce and legitimacy, making world-wide inquiries."

the deceased author's "duty or non-duty to support" while alive is not relevant, since adult, self-supporting children take equally with minors.

Therefore, on the face of it, the statute contains no indication whatsoever that any extraordinary interpretation is to be given to the word "children". Moreover, tracing the legislative history of the renewal section, it is discovered that "children" were introduced as successors in interest to the renewal copyrights as early as the Act of 1831. All subsequent re-enactments and revisions of the renewal sections have repeated the same unqualified word "children".

While decisions may be found in which the same word has been held to have different meanings at different times, these decisions offer no guidance in the present case, where the same unqualified word has been neither added to, nor subtracted from, for one hundred twenty-five years.

In addition, respondent's contention, as presented in her brief below, gains no support from an examination of the practical interpretation placed upon this language since 1831. While one hundred twenty-five years have elapsed since the introduction of "children", as successors in interest to renewal rights, respondent cites neither decision nor text, nor even the existence of prior illegitimate claimants, to support her claim.

That these alleged rights have lain dormant over such an extended period of time, in and of itself, goes far toward proving that these alleged rights never existed.

Thus respondent's case suffers from a complete lack of support.

On the other hand, there is overwhelming evidence that Congress has always understood and has always acted in reliance upon the rule of statutory construction contended

for by petitioner. On those occasions when Congress has so desired, it has specifically included illegitimates in its statutory definition of children.⁵ This practice certainly indicates that Congress has been aware of the statutory construction which courts give to the term "children".

C. It is submitted that the cases relied upon by the court below to support its conclusion that the reference to children in the renewal provisions, includes illegitimate children do not in fact support this conclusion.

Before considering these cases, two footnotes written by the court below call for comment because they indicate where the court fell into error.

Footnote 4 reads: "It will be noted that there is no problem as to the identity of the illegitimate child in the instant case as it is agreed in 'Statement of Undisputed Facts' by the parties that the child Stephen is the illegitimate child of the author and has been publicly acknowledged by the father-author as such. * * *"

The court indicates that it has considered only the peculiar fact situation of this case, and has ignored the broad coverage of the Copyright Act. If it is decided definitively that all illegitimates come within the statutory language we may expect, with certainty, numerous actions brought by illegitimates who have *not* been publicly acknowledged. Since it is in the very nature of such relationships that they be secretive, positive identification will be difficult, and fraudulent claims may be encouraged.

Footnote 6 points out that "In our case the illegitimate son is a dependent of the father and mother".

⁵See Navigation and Navigable Rivers, 33 U.S. C. 902(14); Pay and Allowances, 37 U.S. C. 32(3), 424(1), 505(c), 667(b).

The idea that the Copyright Act has something in common with statutes which provide for "child or dependent relative" permeates the entire opinion of the court below. This idea is totally erroneous. Dependency is never a condition for the acquisition of an interest in a copyright.

Three of the cases cited by the court below are related: *Middleton v. Luckenbach S. S. Co.*, 70 F. 2d 326 (CCA 2, 1934); *Lawson v. U. S.*, 88 F. Supp. 706 (S. D. N. Y., 1950); and *Civil v. Waterman S. S. Corporation*, 217 F. 2d 94 (CCA 2, 1954).

The *Middleton* case construes the Federal Death on High Seas statute (46 U. S. C. 761) which provides death benefits for a "child or dependent relative". The case, at most, stands for the proposition that illegitimate come within the "terms of the act" (p. 330), that is, within either the classification child or dependent relative.

The court in the *Lawson* case does say in passing that the *Middleton* case stands for the proposition that "child" includes illegitimate. Clearly, this is a misreading of the *Middleton* case and was, in fact, unnecessary for the decision reached.

The *Civil* case construed the Jones Act provision (45 U. S. C. 59, incorporated by reference in 46 U. S. C. 688) granting death benefit rights to "children . . . and, if none, then of the next of kin dependent." The court, at page 98, says: "In view of the similarity in statutory language . . . the right of illegitimate children to qualify as beneficiaries extends to the Jones Act as well as to the Death on the High Seas Act. *Middleton v. Luckenbach S. S. Co.*, *supra*." (Emphasis added)

None of these cases stand for the proposition that the term "children" as used in these statutes includes illegitimate.

D. Many restrictions imposed upon illegitimate at common law have been removed by legislative enactments and by judicial decisions based squarely on such prior legislative enactments, or on contractual rather than statutory construction of the word "children". See, e.g., the cases cited by the court below: *In re Estate of Wardell*, 57 Cal. 484 (1881); *Turner v. Metropolitan Life Ins. Co.*, 26 Cal. App. 2d 862, 133 P. 2d 859 (1943). The court below concludes from such cases that illegitimate are now, after one hundred twenty-five years, included within the term "children" as used in the copyright renewal provision.

It is submitted that this reasoning is not sound in construing the Copyright Act. The court is construing a statute which creates unique property and should hesitate to overthrow, retroactively as well as prospectively, an interpretation which has been universally relied upon, and whose rejection at this late date will affect countless transactions consummated over the years.

If there are any possible inadequacies in the present statute, Congress has the power to effect changes, along with the power to limit the scope thereof.

III.

THE DECISION BELOW WILL INJURE NOT ONLY THE MOTION PICTURE INDUSTRY, BUT ALSO LIVING AUTHORS. CONSEQUENTLY, IT IS AGAINST THE PUBLIC POLICY OF THE COPYRIGHT LAW.

In addition to the guides for appropriate judicial construction outlined in Points I and II hereof, this Court should consider the injury which the decision below will inflict on motion picture producers and, concomitantly, on authors.

A. The motion picture producer must acquire rights which are exclusive and will endure for many years.

The motion picture industry is a prolific user of copyrighted material. Not only is the motion picture itself accorded protection under the Copyright Act, but all the creative component parts of the motion picture, i.e., the underlying literary, dramatic and musical works, out of which it is fashioned, are the subject of independent copyright protection. Large sums are spent each year for the acquisition of motion picture rights in such works. The ultimate cost of producing a motion picture represents, of course, a much larger investment. Consequently, the producer must have *exclusive* rights in the work he buys for film production. If the novel or play on which a picture is based can be performed by a competing medium, such as television, the potential gross of the film version will be seriously affected.

As a result of unpleasant experiences motion picture producers can no longer risk the large investment involved in the purchase of motion picture rights in a literary work and the production of a motion picture based thereon if they can be subject to competitive television broadcasts of the work. It is also an economic necessity for the motion picture producer to acquire the motion picture rights, not only exclusively, but also for a sufficiently long period, in order to recoup the substantial investment which the production of a motion picture requires, as well as to insure the maximum return on the investment. Distribution, including reissues, will sometimes continue for many years (as witness the case of "Gone With The Wind"), and it

will often require additional years to utilize the "remake" values of motion pictures.⁶

B. Practice in the motion picture industry as to clearing rights for the renewal term.

Now, it is not unusual for a motion picture producer to acquire the motion picture rights in a work at a time when it is in the final (e.g., the last seven) years of its original term of copyright. In such situations it has been necessary for motion picture producers to insure themselves of a continuation of exclusive rights by acquiring rights with respect to the renewal copyright not only from the author, but also from the wife of the author.

Motion picture producers have relied upon the generally accepted view that a grant with respect to the renewal copyright secured from the living author and his living wife, gave the producer *exclusive* rights with respect to the renewal period if the wife secured such renewal as the author's widow, where the author died prior to the time when such renewal could be secured. It has never been assumed that any surviving children had any interest in the renewal so secured by the widow. In certain instances

⁶The Court of Appeals for the Ninth Circuit in *Columbia Pictures Corporation v. National Broadcasting Company, Inc.*, 107 U. S. P. Q. 344 (S. D. Cal., 1955), in dealing with an analogous situation, that is, the need for preserving the exclusivity of the motion picture producer's right, said, "A studio with no assurance it could protect an investment in a copyrighted work from infringement by unlimited use through burlesque of the work, would tend to pay less and less for an author's work. Unlimited and unrestrained taking by burlesque could destroy the Copyright Act, undermine the motion picture industry, the legitimate stage, and reduce the actor to his status of 300 years ago, dependent on the largess of the Prince or Patron."

motion picture producers have sought a grant of rights from an author's children in addition to the author's wife. Such instances, however, are exceptional and producers have sought such a grant solely to insure themselves of a continuation of the exclusive grant of rights should both the author and the wife die before the accrual of the renewal copyright term. As a practical matter, in the overwhelming number of instances, a grant from the author and his wife has generally been regarded as sufficient protection even though there were children in existence (cf. *Tobatti v. Fischer, supra*).

Speaking for the motion picture industry, we can assure this Court without qualification that motion picture producers have never, without a single known exception, secured a grant with respect to the renewal copyright from an author's illegitimate children.

C. The decision below injures the marketability of literary works.

Since the decision of the learned lower Court, and pending a reversal of that decision by this Court, the situation has completely changed. On the basis of the decision below, if a motion picture producer accepted a grant of rights from a widow and less than all of the children of the author, any child not joining in the grant would, presumably, be free to deal with such work in any manner he deemed desirable. Accordingly, such a child would be in a position to convey a similar grant of rights to a competing medium.

Consequently, the motion picture producer who, for example, during the last few years of the first term of copyright, wishes to buy exclusive rights for the renewal period, must secure clearances from the following:

- i. The living author.
- ii. The author's living wife.
- iii. The author's living children—whether minor or adult and whether legitimate or illegitimate.

Now, in many instances it will not be feasible to deal even with the legitimate children involved. Although there are procedures available under the state laws for the purchase of a minor's contingent future interest, such procedures are often cumbersome and time-consuming. In addition, with respect to foreign works protected by our copyright laws there may not be any procedures available in some of the foreign countries, where such rights would have to be acquired for the purchase of this type of contingent future interest from minors. Thus, should this Court hold that the renewal rights are the property not only of the widow, but also of all the children of the author, the marketability of many literary properties in their renewal term, and, especially, during the final years of their original copyright term, would be seriously affected, if not entirely vitiated.

Prior to the decision of the court below no inquiry was ever made by a motion picture producer in the situations here discussed, as to whether the author had illegitimate children. Since the decision below such inquiry has become an unavoidable, unpleasant necessity.

A striking instance of the injury done to *living* authors by the decision of the Court below is the case of a famous produced play. This play was written by Americans and was based on a foreign play by a foreign author. The first term of copyright of the foreign play still has six years to run. The American authors of the play and the author

of the underlying foreign play agreed to sell the motion picture rights to a major motion picture producer for a sum in excess of \$500,000. Because of the decision of the Court below the producer, for the first time in its history, made private inquiries as to whether any of the authors had any illegitimate children. These inquiries revealed that the foreign author of the underlying play had a number of legitimate children and twice that number of *alleged* illegitimate children and possibly others unknown. Because of this situation the producer concluded that even if a grant with respect to the renewal period were secured from the author's present wife, from his legitimate children and from his more numerous alleged illegitimate children, the title to the rights with respect to the renewal period would still be under a cloud because of the possible existence of other illegitimate children, now unascertainable. This difficulty precluded the consummation of this transaction to the detriment of the authors in an amount of over \$500,000, and to the likely detriment of the producer in a greater amount.

Conceivably the authors of the above mentioned play were able or will be able to sell the rights to another producer who may be willing to take the risks involved because of the existence of alleged illegitimate children. That is not the issue.

The above instance is given only as an illustration of the serious situations which as a result of the decision below, confront not only the motion picture producer but also the author who wishes to sell his creation for motion picture use. The marketability of literary properties is plainly affected. The loss to the motion picture producer who cannot use the properties is substantial. It is obvious, however, that an even greater loss—in impact if not in actual dollars and cents—will be suffered by the author who is unable to

sell his property to the motion picture producer because of the necessity of securing grants from children, i.e., minor, adult, and afterborn children as well as illegitimate children, real or alleged.

Furthermore, time is frequently, if not generally, of the essence in motion picture production, i.e., the "market" for the motion picture rights in most literary works varies with changing times and tastes. The necessity of awaiting the appointment of guardians, the procedures for securing court approval, the uncertainty of foreign legal procedures, and the like, will often discourage or negate altogether the purchase of such property from minor children.

Should this Court hold that illegitimate children are included within the definition of children contained in the statute, the situation would be even more chaotic. The motion picture producer would be required to deal with renewal copyrights at his peril since there is absolutely no procedure available for determining with certainty whether there are illegitimate children of an author. Even if the illegitimate child is acknowledged, this does not alleviate the situation since even where acknowledgment is provided for, it may, as a general rule, be merely a signed paper which need not be made public (see, e.g., § 255, Calif. Probate Code, enacted 1931; amended by Stats. 1943, ch. 998, p. 2912). The recognition of illegitimates within the statutory term, children, suggests further complications. In purchasing motion picture rights from next of kin, will it become necessary to deal with illegitimate brothers, sisters, cousins, nephews, nieces, etc.?

Furthermore, if the executor should renew the copyright in his own name because of the absence of a widow and children, or if the next of kin should renew in the absence of a widow, children and executor, and it should happen

that after either such renewal a person appeared who could establish that he was the illegitimate child of the author; then such prior renewal would be totally void and the work would fall into the public domain completely. *Tobani v. Fischer*, 98 F. 2d 57 (C. C. A. 2, 1938). Furthermore, it is hardly necessary to point out that the mere assertion of a claim by an alleged illegitimate in such a case would cast a serious cloud upon any grant of rights theretofore made with respect to the renewal copyright by such renewing executor or next of kin.

The ramifications are endless.

D. The renewal section should be construed on the basis of what is best for the living, active, creative author. This is in accord with the underlying policy of the copyright law, in general, and the renewal section, in particular.

Shall the renewal section be construed for the benefit of the living author even if to do so may be contrary to the interests of some of his statutory successors? Or shall the section be construed for the benefit of some of the statutory successors of the dead author even if to do so will result, in actual practice, in injury to the living author?

We submit that the foregoing questions are pertinent in construing Section 24. The results of the decision below, as above indicated, leave no room for doubt that the living author will suffer a very real injury if, in order to convey effective rights with respect to the renewal copyright of his work, he must secure additional grants not only from his wife but also from his children, legitimate and illegitimate.

If this Court should find that a doubt is present, and that "widow or children" might conceivably be read as "widow

"and children", then, on the basis of the well settled policy of the copyright law, that reading should be chosen which is most beneficial to the living author.

Copyright begins with public policy and ends with public policy. The first expression of this policy is to be found in Section 8 of the Constitution which empowered Congress to enact copyright legislation, "to promote the progress of science and useful arts".

The last expression of this policy is to be found in the decision of this Court in *Mazer v. Stein*, 347 U. S. 201 (1954) where Mr. Justice Reed, speaking for the Court said at page 219:

"The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort *by personal gain* is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts'. Sacrificial days devoted to such creative activities deserve *rewards*, commensurate with the services rendered."

(Emphasis added).

That the policy above expressed should be adopted, particularly in the construction of the renewal section, was made plain by this Court in *Fisher v. Witmark*, 318 U. S. 643 (1943). In that case Mr. Justice Frankfurter speaking for the Court indicated at page 654 that the object of the renewal section of the Copyright Act is to preserve the renewal term to the author "despite sale of the Copyright" and said: "That this is the basic consideration of policy underlying the renewal provision of the Copyright Act of 1909 clearly appears from the report of the House committee which submitted the legislation . . ." In that report of the House Committee it was stated (*Witmark* at p. 654):

"Your committee, after full consideration, decided that it was distinctly to the advantage of the author to preserve the renewal period." (Emphasis added).

Mr. Justice Frankfurter further stated at page 657: "If an author cannot make an effective assignment of his renewal, it may be worthless to him when he is most in need. Nobody would pay an author for something he cannot sell".

We submit, therefore, in the light of the House Committee Report above referred to, and the decisions and *ratio decidendi* of this Court in *Fisher v. Witmark* and *Maser v. Stein, supra*, that it is the underlying policy of the copyright law to create an "advantage" primarily for the living, active, creative author and only secondarily for his contingent successors named in the renewal section.⁷

Any restrictions imposed upon the author's freedom to deal with the renewal copyright, other than those specifically set forth in section 24, should not be of such a nature that they will be detrimental to the living, creative author. Such, however, is the result of the decision of the Court below.

E. The decision below will cast a cloud on the exclusivity of the rights heretofore purchased, and will subject widows to accounting actions.

Finally, we submit, this Court should not overlook the fact that the decision below, if permitted to stand, will raise innumerable questions as to the exclusivity of the rights

⁷It is to be particularly noted that the House Committee Report, as quoted in the *Witmark* case, is primarily and expressly concerned with the *living author* and his problems, and only incidentally with the problems of the persons who might acquire the renewal because of the author's death.

heretofore paid for and relied upon by purchasers, and as to the duty of widow to account to children for a share of the proceeds received by them for the sale of such exclusive rights.

CONCLUSION

For the reasons stated it is respectfully submitted that this Court should reverse the opinion and judgment of the court below, and find that an author's widow is alone entitled to the renewals of copyrights accruing during her lifetime and that an illegitimate does not come with the term "children" of Section 24 of the Copyright Act, 17 U. S. C. 24.

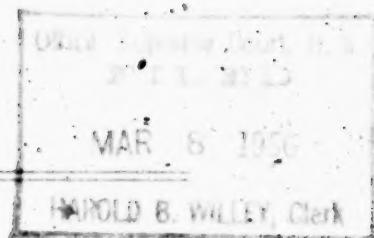
Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1955
No. 529

MARIE DE SYLVA,

Petitioner,

—against—

MARIE BALLENTINE, as Guardian of the Estate of
Stephen William Ballentine,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE
AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

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Opinions Below

The opinion of the District Court (R. 29-32) is unreported. The opinions of the Court of Appeals (R. 47-71) are reported in 226 F. 2d 623.

Jurisdiction

Jurisdiction was invoked under the Federal Declaratory Judgment Act, 28 U. S. C. § 2201, and 28 U. S. C. § 1338 (a), the action relating to ownership of renewal rights under the Federal Copyright Act, 17 U. S. C. § 24. The District Court awarded summary judgment to defendant (petitioner herein) on April 29, 1953 (R. 34). The Judgment of the Ninth Circuit Court of Appeals revers-

ing the District Court was entered August 25, 1955 (R. 62). Certiorari was granted January 9, 1956. At the same time the Court granted the American Society of Composers, Authors and Publishers (hereinafter called the "Society") leave to file a brief as *Amicus Curiae* (R. 73).

For an analysis of cases involving declaratory judgment as applied to questions involving ownership of renewal rights, see *Carmichael v. Mills Music Inc.*, 121 F. Supp. 43 (S. D. N. Y. 1954).

Statutes Involved

The pertinent provisions of the Copyright Act of 1909, as amended (17 U. S. C. § 24), is:

“§ 24. DURATION; RENEWAL AND EXTENSION.—The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: Provided, That *** the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children, be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright ***.”

The previous Statutes relating to renewal rights are printed in the Appendix.

Question Presented

This brief will not discuss the question of illegitimacy. It will be limited solely to the question presented upon the Society's motion for leave to file a brief as an *Amicus*, namely:

Upon the death of an author leaving a widow and children is the widow alone entitled to renewal rights in those works which may be renewed after her husband's death and during her lifetime? (It is unquestioned that the widow has no interest in renewal rights in those works which may be renewed after her death, and that the children are solely entitled to such renewals if they be then living).

Statement of the Case

Petitioner's late husband, George G. De Sylva, a writer of musical works, died in 1950. Many of his works were first copyrighted during the last 28 years of his life, as a result of which several have been renewed by petitioner, his widow, and others will come up for renewal in the future (R. 4, 5, 12).

Respondent, Marie Ballentine, as Guardian of the Estate of her minor child, Stephen William Ballentine (a son of Mr. De Sylva born out of wedlock), brought an action for a declaratory judgment on August 8, 1952, seeking a declaration that the child was entitled to share renewal rights in De Sylva's copyrights equally with petitioner (R. 3-7). In petitioner's answer she claimed as sole owner of the renewals as the widow of De Sylva, and challenged the infant's claim to be a child of the deceased (R. 12-13).

Both parties moved for summary judgment (R. 14, 24, 25). The District Court denied respondent's (plaintiff's) motion and granted that of petitioner, holding that so long as petitioner is alive she, as the widow of George G. De Sylva, is the sole owner of renewals of copyrights in which George G. De Sylva had an interest (R. 33, 34).

The Court of Appeals for the Ninth Circuit reversed the District Court holding that the renewal of the copyright of a deceased author "is for the benefit of the surviving spouse and children together" (R. 56). Judge Fee dissented on the ground that the courts should not grant declaratory relief in a case such as this until after a prior determination has been made by the Register of Copyrights and further that "it was an abuse of discretion for the trial court to attempt to give declaratory relief in a field so beset with questions going to the primary right as this. 28 U. S. C. §§ 2201, 2202" (R. 67-71).

Argument

Petitioner's brief adequately covers the point that the history of Section 24 of the Copyright Act (17 U. S. C.) and its clear language indicate that the interpretation placed upon the statute by the District Court, should not have been upset on appeal.

This brief will attempt to avoid unnecessary discussion of that phase of the case; it will stress the practices in the profession of writing and the business of publishing which support petitioner's interpretation. It is submitted that if the Court should be in doubt about the interpretation of the statute, then—and only then—the case should be remanded to the District Court to receive evidence of the interpretation placed upon the statute by authors and their grantees since 1870 when the law was first enacted in substantially its present form,—or at least since 1909,

the date of the last general revision of the Copyright Act, *Kennedy v. Silas Mason Co.*, 334 U. S. 249-256 (1948); *Stevens v. Howard D. Johnson Co.*, 181 F. 2d 390, 394 (4th Cir. 1950).

As the motion of the Society for leave to file a brief as an *Amicus* points out, the custom and practices of parties dealing with these properties shows that they have at all times believed that the widow is solely entitled to those renewals which come into being during her lifetime (after her husband's death) and that the children are solely entitled to the renewals which come into being after her death.

POINT I

During Mr. De Sylva's lifetime it was the belief of composers, authors and publishers that renewal rights first accruing after a writer's death vested solely in his widow, and that such rights first accruing after her death vested in his children. Presumably his estate was planned with this in mind.

George G. De Sylva, a member of the Society from 1920 to the time of his death, served on its Board of Directors from 1922 to 1930. McNamara, *ASCAP Biographical Dictionary of Composers, Authors and Publishers* (2d ed. 1952) 119.

Upon Mr. De Sylva's death, the Society named petitioner as his successor, and has been paying to her the royalties which would have been payable to her husband had he been living. She in turn, has granted to the Society the right to license performing rights in the musical compositions of her deceased husband (Motion, par. 7, p. 2).

This designation was pursuant to the Society's customary practice in cases where a writer member dies

leaving a widow and children; that is, it regards the widow as the person entitled to renewal rights in those works which may be renewed after her husband's death and during her lifetime (Motion, par. 8, pp. 2-3).

This is the view of all 24 members of the Society's Board of Directors, and has been the consistent opinion of its counsel (Motion, par. 10, p. 3).

Mr. De Sylva, as a member of the Society's Board of Directors from 1922 to 1930 was presumably familiar with this interpretation of the law and drafted his will in relation to it.

POINT II.

The authorities whose experience embraced the enactment of the 1909 Law support petitioner's interpretation of the Act.

In examining the views of textwriters who interpreted the law before Mr. De Sylva's death—cited in petitioner's brief—it should be noted that two of them, Richard C. De Wolf, and William B. Hale (author of the article on Copyright in *Corpus Juris*) were actively engaged in the copyright field when the 1909 Act was passed.

De Wolf spent practically his entire professional life in the Copyright Office, ultimately becoming Acting Register of Copyrights. He was there at the time of the 1909 Act.

Mr. Hale, author of the treatise on Copyrights in *Corpus Juris* was a distinguished authority on copyright and Associate Editor-in-Chief of *Corpus Juris*. As attorney for the American Law Book Company, he was active in the preparation of the 1909 Act, and actually testified regarding the renewal provision of the Bills leading to Act of 1909 (Hearings Before Joint Comm. on Patents of Senate and House on Pending Bills to Amend and

Consolidate the Acts Respecting Copyright, Mar. 27, 1908, pp. 76-7). An examination of the 300 pages devoted to this subject in *Corpus Juris* makes it quite apparent that the copyright bar is justified in regarding this article as one of the leading works on the subject. This is an unusual compliment for a contribution to a law encyclopedia.

Margaret Nicholson's work has become almost a bible—certainly a universal desk-aid—to the entire publishing industry.

These authors know their subject, and have apparently taken the pains to find out what the business practices are. Incidentally, they were all written before Mr. De Sylva's death. The statements of writers relied on by respondent are of recent origin—having been formulated after Mr. De Sylva's death. They have not been endorsed by the leaders of the copyright bar or by the writing and publishing fraternity, whose interests are primarily involved.

POINT III

In awarding to the widow of a deceased author the renewal rights arising during her lifetime, and to his children the renewal rights which arise after the widow's death, Congress adopted a logical pattern.

Respondent urges that the widow and children should be treated as members of a single class, because to do otherwise would favor the widow as against the children. The respondent assumes that the decision of the District Court excluded children from any interest in renewal rights. That was not the result of the District Court decision. On the contrary, the children alone—and to the exclusion of the estate of the widow—are entitled to the exclusive rights in renewals arising after the widow's death. If they were both members of one class, it would seem that the class would close upon the author's death.

and that the widow would therefore have a vested interest in renewals arising after her death, which would cut down the exclusive enjoyment of such renewals by the children.

If the widow and children are members of the same class—and there should be a number of children, possibly by a prior marriage, and possibly all adults—an impecunious widow might find herself in a position of enjoying only a very small fraction of an interest in renewal rights, and having no ability to market them unless the children were willing to join in a conveyance. With several children involved, and with the possibility of friction developing between children and widow, the marketability of the widow's rights would be greatly impaired—a result which no author having a normal family life would welcome.

These results might have followed from the language of the statute as it existed before 1870. The act of 1831 provided that the renewal rights of a deceased author passed to the "widow and child, or children." Act of February 3, 1831, 4 Stat. L. 436. When the act of 1870 was passed, this was changed to "widow or children". R. S. § 4954. The disjunctive form was continued in the act of 1909. In the words of Judge Shiras, "It is a fundamental rule of construction that * * * when a previous statute is amended by an alteration of the terms used therein, it is to be assumed that it was the intent to alter the meaning of the previous act in that particular. * * * The natural presumption is that the phraseology of the statute was changed in order to change its meaning" *U. S. v. Bashaw*, 50 Fed. 749, 753-4 (8th Cir. 1892), *rev'd on other grounds*, 152 U. S. 436 (1894). See also *U. S. v. Woodruff*, 175 Fed. 776; 777 (2d Cir. 1909).

As petitioner's brief points out, the law was then and has since been well settled that the mention of a person (in this case the widow or widower) "or his children", results, in the construction that the children have a gift only by substitution in the event of the death of the named person prior to the event which makes the gift effective—

in the case of wills, upon the death of the testator, and in the case of copyright renewals, upon the expiration of the initial term. *Bender v. Bender*, 226 Pa. 607, 75 Atl. 859 (1910); *Matter of Lane*, 79 Misc. 71 (N. Y. 1913); *Penley v. Penley*, 12 Beav. 547, 50 Eng. Rep. 1170 (1850); *Tate v. Amos*, 197 N. C. 159, 147 S. E. 809 (1929); *Schaeffer's Adm'r v. Schaeffer's Adm'r*, 54 W. Va. 681, 46 S. E. 150 (1903); *Carlin v. Helm*, 331 Ill. 213, 162 N. E. 873 (1928); *Rolf's & Leising's Guardian v. Frischolz's Exr.*, 251 Ky. 450, 65 S. W. 2d 473 (1933); *Mead v. Close*, 115 Conn. 443, 161 Atl. 799 (1932).

This interpretation as applied to copyright renewals provides for the widow during her lifetime and for the children after her death. As in the case of dower rights and laws safeguarding the widow's right of election, it must be recognized that the widow has a claim on a portion of the estate of her husband which is prior to that of the children. Laws relating to other forms of property are less considerate of children than is Section 24 of the Copyright Act as interpreted by the District Court; for an owner of such other forms of property may disinherit his children absolutely, whereas it is conceded that an author may not do so if both he and his wife fail to survive the twenty-seventh year of the initial term.

Conclusion

The judgment of the Court of Appeals should be reversed and the judgment of the District Court reinstated.

Respectfully submitted,

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March 6, 1956

APPENDICES

Provisions relating to renewal in Copyright Acts of 1790, 1831 and 1870

APPENDIX I

Section 1, Act of May 31, 1790, 1 Stat. L. 124-126:

“And if, at the expiration of the said term, the author or authors, or any of them, be living, and a citizen or citizens of these United States, or resident therein, the same exclusive right shall be continued to him or them, his or their executors, administrators or assigns, for the further term of fourteen years ***.”

APPENDIX II

Section 2, the Act of February 3, 1831, 4 Stat. L. 436:

“Sec. 2. *And be it further enacted*, That if, at the expiration of the aforesaid term of years, such author, inventor, designer, engraver, or any of them, where the work had been originally composed and made by more than one person, be still living, and a citizen or citizens of the United States, or resident therein, or being dead, shall have left a widow, or child, or children, either or all then living, the same exclusive right shall be continued to such author, designer, or engraver, or, if dead, then to such widow and child, or children, for the further term of fourteen years ***.”

APPENDIX III

Revised Statutes, July 8, 1870, Section 4954:

"SEC. 4954. The author, inventor, or designer, if he be still living and a citizen of the United States or resident therein, or his widow or children, if he be dead, shall have the same exclusive right continued for the further term of fourteen years, upon recording the title of the work or description of the article so secured a second time, and complying with all other regulations in regard to original copyrights, within six months before the expiration of the first term. * * *"

IN THE
Supreme Court of the United States
October Term 1955

No. 529

MARIE DE SYLVA,

Petitioner,

against

**MARIE BALLENTINE as Guardian of the Estate of
Stephen William Ballentine,**

Respondent.

**BRIEF ON BEHALF OF SONGWRITERS
PROTECTIVE ASSOCIATION AS
AMICUS CURIAE.**

SCHULMAN, KLEIN & STERN
*Attorneys for Songwriters Protective
Association, as Amicus Curiae*

**JOHN SCHULMAN
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**BRIEF ON BEHALF OF SONGWRITERS
PROTECTIVE ASSOCIATION AS
AMICUS CURIAE**

This brief *amicus curiae* is submitted pursuant to permission granted by the Court on January 9, 1956.

**The Interest of Songwriters Protective
Association**

Songwriters Protective Association has no property or financial interest in the controversy between the parties. It is a voluntary association of authors and composers of music. Its members and their families will be affected generally by the construction given in this case to the renewal provisions of the Copyright Act (17 U. S. C., Section 24).

The Construction of the Statute Proposed Herein

It is submitted that:

- a. Section 24 of the Copyright Act should be construed as granting to an author's widow a priority in status over his children;
- b. The term children should include only those who are legitimate.

The Scope of this Brief

Since the facts of the controversy will be developed by the respective parties to the action, the Court will not be burdened herein by any restatement of the facts as they appear in the record. This brief will seek to present various elements which should be considered in the construction of the statutory provision.

POINT I

Section 24 of the Copyright Act should be construed as granting to an author's widow a priority in status over his children.

The question before the Court is one of first impression.

The renewal provisions of the Copyright Act have been considered by this Court on two occasions. In *Fox Film Corporation v. Knowles et al.* (1923), 261 U. S. 326, the decision was that an executor named in the will of an author who had died leaving no widow or children, could properly apply for the renewal, although the author's death had occurred prior to the time when the renewal

right matured. The renewal was recognized to be a new grant, not merely an extension, or prolongation of the original term, and consequently the executor named in the author's will took precedence over the next of kin.

Fred Fisher Music Company, Inc. v. M. Witmark & Sons (1943), 318 U. S. 643, concerned the rights of a living author who had survived beyond the expiration of the first term of copyright. The question in that case was whether an agreement made by the author to renew the copyright and to assign the renewal to a publisher was enforceable. The ruling of this Court was that Congress had not established a policy of preventing an author from contracting to convey his renewal if he survived until it matured. The opinion did not disturb the doctrine that the agreement would be binding only upon the author, and such an agreement would not impair the rights of the statutory grantees who would take in his place if the author failed to survive.

The instant case refines the problem to a determination of the status of the author's widow and children vis-a-vis each other, and the answer depends upon the construction of the following portion of Section 24:

"the author of such work, if still living; or the widow, widower, or children of the author, if the author be not living, * * * shall be entitled to renewal and extension in the copyright in such work for a further term of 28 years."

The narrow issue herein presented has not heretofore been decided by this or any other Court.

In ruling that the widow and children constitute a single class, the reasoning of the Court of Appeals seems to have been as follows (R. pp. 50-52):